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No. 82-2053

In The

Supreme Court of the United States

October Term, 1982

ELMER H. SINGLETON,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals properly affirm the trial court's entry of judgment notwithstanding the verdict for Virginia Electric and Power Company?

2. Has the Fourth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE[1]

Virginia Electric and Power Company (Vepco)[2] notes several inaccuracies and omissions in the Petitioner's Statement of the Case. The Petition for Writ of Certiorari (the Petition) fails to mention that the trial court granted co-defendant Arthur J. Lancaster, Jr.'s Motion for Directed Verdict on the ground that Lancaster, as a landowner, had

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[1] References to the record for this case shall be made to the pages of the Joint Appendix filed in the Fourth Circuit Court of Appeals.

[2] In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, Vepco notes that its parent corporation is Dominion Resources, Inc. and its sole affiliate is Dominion Resource Services, Inc.

no duty to warn Elmer H. Singleton of Vepco's overhead electric lines at the nursery because the lines were open and obvious. Moreover, the trial court did not rule, as the Petition states, that a jury issue existed as to Singleton's contributory negligence. As is obvious from the trial court's ruling on Vepco's Motion for Judgment Notwithstanding the Verdict, the trial court found that Singleton was contributorily negligent as a matter of law and, therefore, barred from recovery under controlling Virginia law.

The Petition also fails to mention that the trial court, pursuant to Rule 50(c) of the Federal Rules of Civil Procedure, granted conditionally Vepco's motion in the alternative for a new trial on the grounds that the jury's findings that Vepco was negligent and that Singleton was not contributorily negligent were "overwhelmingly contrary to the evidence and law, as instructed by the court." 19A.

Vepco does not take issue with the facts set forth in the Petition, but will point out other pertinent evidence in its Argument.

SUMMARY OF ARGUMENT

This diversity of citizenship case exclusively involves Virginia's substantive law of negligence and contributory negligence. The judgment entered by the trial court was fully in accord with controlling decisions of the Virginia Supreme Court, Rule 50 of the Federal Rules of Civil Procedure, and pertinent decisions of this Court regarding the Seventh Amendment of the United States Constitution. The Fourth Circuit Court of Appeals carefully considered and properly rejected, in its per curiam opinion, Singleton's contention that the trial court erroneously granted Vepco's motion for judgment notwithstanding the verdict. Signifi-

cantly, no judge of the Fourth Circuit requested a poll on Singleton's suggestion for rehearing en banc and, accordingly, the petition for rehearing properly was denied. Clearly, no special or important reason exists for the issuance of a writ of certiorari.

ARGUMENT

Counsel for Singleton ask this Court to review a decision of the Fourth Circuit that turned exclusively on a finding that Singleton was contributorily negligent as a matter of law under controlling Virginia law in carelessly raising the trailer of his dump truck into plainly visible overhead power lines. Singleton's counsel, having failed to persuade either the trial court or the Fourth Circuit that the evidence, when viewed most favorably to him, created a jury issue as to his contributory negligence, now seek a writ of certiorari on the grounds that (i) entry of judgment notwithstanding the verdict for Vepco violated Singleton's Seventh Amendment rights and (ii) the Fourth Circuit "has attempted to ignore its responsibilities"[3] by failing to follow controlling precedent in that circuit and by not discussing fully arguments raised on appeal. These contentions are patently without merit and the Petition should be denied.

1. Vepco Properly Was Granted Judgment Notwithstanding The Verdict

Singleton's counsel contend that the trial court's refusal to uphold the jury's verdict constitutes a deprivation of Singleton's Seventh Amendment rights. Singleton's counsel do not maintain that the procedure set forth in Rule 50(b) of the Federal Rules of Civil Procedure for entry of judg-

[3] Petition at 14.

ment notwithstanding the verdict violates the Seventh Amendment. Such an argument is precluded, of course, by this Court's rulings that the federal procedure for entry of judgment notwithstanding the verdict clearly is consistent with the Seventh Amendment and the Rules of the Common Law. *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 659-60 (1935). Thus, Singleton's argument is simply that the evidence raised a jury question as to whether he was contributorily negligent.

In this diversity case, the substantive law of Virginia controls whether Singleton was contributorily negligent. *Harner* v. *John McShain, Inc.*, 394 F.2d 480, 481 (4th Cir. 1968); *Burcham* v. *J. P. Stevens & Co.*, 209 F.2d 35, 40 (4th Cir. 1954); *see Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Singleton's counsel ignore this principle and argue that federal rather than state standards determine whether the evidence supports the jury's conclusion that Singleton was not contributorily negligent.[4] The argument, however, is irrelevant in a case such as this where the federal and state tests of the sufficiency of the evidence are identical. *See* 9 Wright & Miller, *Fed. Prac. & Pro.* § 2525, at 549-51.

Under both federal and Virginia law, when the evidence viewed in the light most favorable to Singleton will not support the reasonable inference that Singleton exercised ordinary care for his own safety, contributory negligence becomes a question of law for the court. *Compare Burcham*

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[4] This Court has never resolved the question whether, in a diversity case, state or federal standards determine whether evidence is sufficient to support a jury verdict. *See Wetzel* v. *Eaton Corp.*, 62 F.R.D. 22, 25 (D. Minn. 1973) (citing *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 444-45 (1959)); 9 Wright & Miller, *Fed. Prac. & Pro.* § 2525, at 549-51.

v. *J. P. Stevens & Co.*, 209 F.2d at 37, *with Smith* v. *Virginia Electric and Power Co.*, 204 Va. 128, 132, 129 S.E.2d 655 (1963). *See also Galloway* v. *United States*, 319 U.S. 372, 373, 386-88 (1943); *Virginia Electric and Power Co.* v. *McCleese*, 206 Va. 127, 133, 141 S.E.2d 755 (1965). Here, the evidence, when considered in the light most favorable to Singleton, conclusively established that he failed to look for and see power lines that were in plain view and that he knew could injure him. Therefore, contributory negligence was a question of law for the trial court.

Under these circumstances it was not only the right, but the duty of the trial court to enter judgment for Vepco. *See Bowditch* v. *Boston*, 101 U.S. 16, 18 (1879). The exercise of the trial court's vital control over the jury's verdict in this case was consistent with Rule 50(b), was required by the substantive law of Virginia, and was necessary to avoid a miscarriage of justice. *Garrison* v. *United States*, 62 F.2d 41, 42 (4th Cir. 1932); *cf. Turner* v. *Atlantic Coast R.R.*, 292 F.2d 587, 589 (5th Cir. 1961).

Under Virginia law two elements are necessary to establish that a person injured by contacting overhead power lines was contributorily negligent as a matter of law. First, the person, or a reasonable person in the same circumstances, must have recognized some danger in contacting overhead power lines by means of the instrumentality under his control at the time of the accident. Second, the power lines contacted must be open and obvious. *See Smith* v. *Virginia Electric and Power Co.*, 204 Va. 128, 129 S.E.2d 655 (1963); *Watson* v. *Virginia Electric and Power Co.*, 199 Va. 570, 100 S.E.2d 774 (1957). The evidence in this case established both elements conclusively.

The Virginia Supreme Court long has recognized that the danger of electrical energy is a matter of common

knowledge to all persons of ordinary intelligence and experience and that all competent persons are well aware that any line carrying electrical current is potentially harmful. *See Watson* v. *Virginia Electric and Power Co.*, 199 Va. at 575, 100 S.E.2d at 778. The dangers of electricity need not have been imputed, however, to Singleton. He testified unequivocally that he appreciated the dangers of electricity. 218A-19A. He admitted knowing that he could be injured if he contacted the power lines at the nursery as the following testimony at trial reveals:

> [Counsel for Vepco]: And if you had seen those power lines at the nursery on the day of the accident you would not have tried to raise your trailer?
>
> [Mr. Singleton]: No Way.
>
> [Counsel for Vepco]: Why is that?
>
> [Mr. Singleton]: Because all the way down the line I had hear'd how dangerous that could be and how other drivers had been hurt and no way I would dump against a power line.
>
> [Counsel for Vepco]: Because you would be injured; isn't that true?
>
> [Mr. Singleton]: Yes, sir.

218A-19A.

In addition to demonstrating conclusively that Singleton was aware of the danger presented to the operator of a dump trailer by overhead power lines such as those at the nursery, the evidence proved, as a matter of law, that the power lines at the nursery were open and obvious. Numerous photographs admitted into evidence and the testimony of all witnesses conclusively established that the power lines contacted by Singleton were unobstructed and plainly visible to

any person exercising ordinary care for his own safety. Singleton's counsel, however, say a jury question existed on this issue. They argue that because Singleton says he looked toward the pine bark mixing area before deciding to unload the bark, and did not see the overhead power lines, a jury question existed as to his credibility and the visibility of the lines.

Whether Singleton testified that he saw the lines or not is not the question under Virginia law. The question is whether the lines should have been seen by an experienced truck driver who intended to raise a dump trailer over 27 feet in the air and who knew he could be injured by contacting those lines. When examined in the light most favorable to Singleton, the evidence conclusively showed that any reasonable person in the same circumstances would have seen the lines before fully elevating the 28-foot dump trailer.

When Singleton arrived at the nursery on the day of the incident he was well aware of the need to be cautious while operating the truck and dump trailer and knew he could be injured by contacting overhead power lines with the trailer. 190A-91A & 218A-19A. Although he had never been on the nursery's premises before, by his own admission he "never drove into an area that I was new to without being sure that I could do the job. . . ." 171A-72A. Singleton drove into the nursery's premises alongside Vepco's utility poles and power lines, parked his truck, and then walked directly beneath the power lines in question. After finding no one at the nursery to receive the bark, he returned to his truck and backed the truck onto a concrete slab used by the nursery to store pine bark. At that location the power lines were approximately 23 feet overhead. Singleton then got out of the cab of the tractor to release the tailgate lever on the dump trailer. While preparing to raise a potentially

dangerous instrumentality over 27 feet in the air Singleton, by his own admission, did not look overhead and see the plainly visible power lines. 237A. Instead, he simply returned to the truck and raised his trailer into the power lines.

Singleton's testimony that he looked for, but did not see any power lines before backing his truck onto the concrete slab must be viewed in light of his unequivocal testimony that he saw the lines with no difficulty when he returned to the nursery several months after the accident.

> [Counsel for Vepco]: When you went back out to the accident site you saw the power lines, didn't you?
>
> [Mr. Singleton]: Yes, sir, when I went back out there in May [1979], I was aware of the fact that the lines were already there.
>
> [Counsel for Vepco]: And you had no trouble seeing the power lines?
>
> [Mr. Singleton]: No, I went out there to look for them and at them.
>
> [Counsel for Vepco]: And you went directly to the point of the accident?
>
> [Mr. Singleton]: Before I left the accident area, yes, sir.
>
> [Counsel for Vepco]: And when you stood at that point and looked up you had no trouble seeing those lines, did you?
>
> [Mr. Singleton]: No, sir, I was looking for them.

206A-07A. In view of this evidence and the testimony of every other witness who visited the nursery that the lines

were plainly visible there clearly was no doubt that the lines were open and obvious under Virginia law.[5]

Both the trial court and the Fourth Circuit have carefully combed the record, including Singleton's testimony, and have examined the evidence, and all reasonable inferences that can possibly be drawn therefrom, in the light most favorable to Singleton. Still, applying this strict scrutiny, these courts have concluded that Singleton was contributorily negligent as a matter of law. Sympathy for Singleton's serious injuries is strong in this case, but the Fourth Circuit and the trial court carried out their paramount duty to maintain the integrity of the substantive state law. *See Turner* v. *Atlantic Coast Line R.R.*, 292 F.2d 586, 589 (5th Cir. 1961). These courts could not properly have allowed the jury's verdict to stand without rendering meaningless the defense of contributory negligence under Virginia law. Accordingly, Vepco was entitled to judgment notwithstanding the verdict.

2. The Fourth Circuit Has Not Disregarded Controlling Precedent

Singleton also has argued that a writ of certiorari should be granted because the Fourth Circuit's per curiam decision was inconsistent with its earlier per curiam decision in *Keller* v. *Virginia Electric and Power Co.*, No. 81-2199 (4th Cir. May 10, 1982). Although the facts in *Keller* were

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[5] As the trial judge observed:

> I do think that it is undisputed by this evidence that these lines were open and obvious in the sense that had anyone looked from the ground up that person would have seen these lines. That is to say no weather conditions, no bright sun that blocked anybody's view, it was no storm. It was overcast but that is the extent of it. Cold weather wouldn't make any difference. I can't help but conclude that in fact it was open and obvious.

268A-69A.

similar to the facts in this case, in no way can the Fourth Circuit's decision in this case be construed as inconsistent with the holding in *Keller*.

The Fourth Circuit's decision in *Keller* summarily affirmed the entry of judgment for Vepco in accordance with a jury verdict. The contention that the jury verdict in *Keller* was based on a finding that the plaintiff in that case was contributorily negligent is mere speculation. Furthermore, that the Fourth Circuit remarked in affirming the trial court's judgment in *Keller* that "the case was fairly tried and fairly submitted to the jury," cannot possibly be interpreted as controlling precedent regarding Virginia's doctrine of contributory negligence or the standard in the Fourth Circuit for reviewing a motion for judgment notwithstanding the verdict. These issues were not addressed by the Fourth Circuit in *Keller*.

Singleton's contention that a conflict exists between the unpublished per curiam decision of the Fourth Circuit in this case and the earlier unpublished per curiam decision of the Fourth Circuit in *Keller* is absurd. The argument was raised in Singleton's petition for rehearing en banc and was rejected by the Fourth Circuit. Obviously, the Fourth Circuit's action in this case is not a departure from "the accepted and usual course of judicial proceedings" within the meaning of Rule 17.1(a) of the Rules of the Supreme Court. Furthermore, the alleged conflict between the Fourth Circuit's decision in this case and in *Keller* is not a conflict between federal courts of appeals within the meaning of Rule 17.1(a). Thus, there clearly is no reason for this Court, in the exercise of its discretion, to grant a writ of certiorari.

CONCLUSION

The Fourth Circuit properly affirmed the trial court's judgment notwithstanding the verdict for Vepco on the ground that Singleton was contributorily negligent as a matter of law under the law of Virginia. Moreover, neither this Court's policy of insuring wise judicial administration nor its practice of resolving conflicts among the federal courts of appeals justifies a grant of a writ of certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Rule 28.3 of the Rules of the Supreme Court of the United States, three copies of the foregoing Brief in Opposition were deposited in a United States mailbox on July 15, 1983, with first-class postage prepaid, addressed to Leonard T. Jernigan, Jr., counsel of record for Petitioner, at Michaels & Jernigan, Cooper Square, 17 Glenwood Avenue, Raleigh, North Carolina 27603.

G. H. GROMEL, JR.